A **KWAN TECK HIAN v. INSULFLEX CORPORATION SDN BHD**

HIGH COURT MALAYA, KUALA LUMPUR
MOHD NAZLAN GHAZALI J
[ORIGINATING SUMMONS: WA-24NCC-15-01-2017]
15 JUNE 2017

B

CIVIL PROCEDURE: *Striking out – Originating summons – Application by director for inspection of company's financial records – Company applied to strike out director's originating summons – Allegation that director failed to state grounds for application in originating summons – Whether fatal to director's application –*
C *Whether mere irregularity – Whether curable – Whether company prejudiced by non-inclusion of grounds for application – Rules of Court 2012, O. 7 r. 3 & O. 2 r. 1*

COMPANY LAW: *Director – Rights and powers of director – Statutory right to inspect – Director suspended from directorship due to alleged wrongful acts – Request*
D *by director for inspection of company's financial records – Concerns over financial health of company and suspicions of misappropriation of banking facility – Request not acceded by company – Whether rights, duties and powers of director affected by suspension – Whether company proved that request for inspection was for ulterior or improper motive – Whether director's wrongful acts damaged operations of*
E *company – Companies Act 1965, s. 167*

The plaintiff was the managing director of the defendant. The defendant obtained a loan facility from Public Bank ('PB') for the amount of RM8.5 million. It was decided that the signatures of any two of the defendant's directors would be sufficient to validate cheque payments of the defendant
F exceeding RM5,000. A directors' circular resolution later established an executive committee to the effect that certain business transactions or dealings for the defendant could only be pursued by the directors if authorised by the EXCO. According to the plaintiff, he had stopped signing cheques and was denied access to the defendant's company's accounting and
G financial documents. During the defendant's company annual general meeting, the plaintiff raised his objection to the proposal to utilise the Public Bank facility for contract works or the acquisition of a small company or to finance out the loan. The plaintiff unilaterally issued a letter to PB and the other banks, requesting them to freeze the defendant's monies ('the impugned
H acts'). One of the banks, AmBank Islamic Bhd, acted on the plaintiff's request. Maintaining that the impugned acts were unacceptable and a sabotage against the defendant, the defendant demanded an explanation and issued the plaintiff with a show cause letter along with a notice that a Board meeting would be held. In response, the plaintiff requested from the
I defendant a copy of the updated management accounts of the company to be made available at the upcoming Board meeting. The defendant proceeded to hold a domestic inquiry against the plaintiff who chose not to attend. The disciplinary panel found the plaintiff guilty of gross misconduct and

recommended the termination of the plaintiff's employment. During the board meeting, the plaintiff handed over an explanatory statement pertaining to the impugned acts. The Board members accepted the disciplinary panel's recommendation and resolved to suspend the plaintiff's directorship. Hence the present application by the plaintiff. The plaintiff sought an inspection of the financial records of the defendant and for the appointment of an auditor to assist him for such purpose ('encl. 1'). To justify the commencement of the application, the plaintiff submitted that (i) his statutory right, as a director, to have access to the defendant's accounts and books was denied; and (ii) there were serious concerns that the PB facility was being misused and there was a steady deterioration of the defendant's financial standing. In its application to strike out encl. 1 ('encl. 3'), the defendant argued that (i) the plaintiff failed to comply with O. 7 r. 3 of the Rules of Court 2012 ('the ROC') as his originating summons ('OS') did not include what the plaintiff prayed for; and (ii) as the plaintiff had been suspended from directorship, he had no *locus standi* to initiate encl. 1.

Held (allowing encl. 1; dismissing encl. 3):

(1) The non-inclusion of the grounds for the application could not necessarily be fatal. Order 7 r. 3(1) of the ROC requires the plaintiff to include in his OS, a statement of the questions on which he sought the determination or direction of the court and sufficient particulars to identify the cause or causes of his action. However, the language of O. 7 r. 3 does not specify that grounds for the application must be stated. The defendant had not mentioned any form of prejudice or injustice that had been occasioned by the non-inclusion of the grounds, let alone one that had been suffered by the defendant as a consequent. The non-compliances by the plaintiff were neither fatal nor incurable. They amounted to a mere irregularity which ought not to nullify the OS within the contemplation of O. 2 r. 1 of the ROC. (paras 29, 30, 34 & 36)

(2) A suspension of directorship *per se* pending removal was, at best, only an administrative arrangement. In the absence of any legal basis for suspension in the articles, the rights, duties and powers of a company director could not be affected or whittled down; what more suspended altogether by the mere decision of the Board to effect the 'suspension'. Furthermore, s. 167 of the Companies Act 1965 plainly gives the court the power to permit access to company records by an approved company auditor, on behalf of the requesting director. (paras 47 & 74)

(3) In order to lawfully deny inspection right, the defendant of the Board must, without exception, show clear proof that the inspection was for an ulterior or improper motive or purpose which was incompatible with the proper performance and discharge of a director's powers and duties. The basis relied on by the defendant in suspending and thus denying the plaintiff access to the defendant's documents was largely the impugned

A acts, which were a past wrong. However, the fact of the matter was that no damage to the operations of the company had been occasioned. Only one bank proceeded to freeze. It had not been shown how the impugned acts had any real connection with the refusal to accede to the plaintiff's request for access to the defendant's financial records. The plaintiff
B stated his concerns on, *inter alia*, the state of defendant's financial health. This was certainly matters for a director to be aware of and accountable to. Denial of access rendered the director in question unable to perform his statutory and fiduciary functions. (paras 77, 78, 79, 80 & 81)

(4) The defendant had not succeeded in establishing a case for the striking
C out of the OS filed by the plaintiff. The plaintiff, on the other hand, had successfully proved his case on a balance of probabilities to justify the inspection rights. (para 95)

Case(s) referred to:

D *Amirthanayaki Kumarasamy v. Lembaga Kelayakan Profesion Undang Undang Malaysia [2010] 6 CLJ 593 CA* ***(refd)***

Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***

Dato' Seri Timor Shah Rafiq v. Nautilus Tug & Towage Sdn Bhd [2017] 1 LNS 579 HC ***(refd)***

E *Deluge Holdings Pty Ltd & Anor v. Bowlay & Ors [1991] 9 ACLC 1486* ***(refd)***

Dr Woo Kin Chong v. Mary Ou Holdings Sdn Bhd [1997] 5 CLJ 164 HC ***(refd)***

Fong Poh Yoke & Ors v. The Central Construction Company (Malaysia) Sdn Bhd [1998] 4 CLJ Supp 112 HC ***(refd)***

Ho Yee Chin v. Ho Min Hao & Ors [2016] 6 CLJ 728 HC ***(refd)***

Jan De Nul (Malaysia) Sdn Bhd & Anor v. Vincent Tan Chee Yioun & Anor And Other
F *Cases [2016] 1 LNS 1234 HC* ***(refd)***

Jerry Ngiam Swee Beng v. Abdul Rahman Mohd Rashid & Anor [2003] 3 CLJ 739 HC ***(refd)***

Karisma Saujana Sdn Bhd v. Albert Antoni Tass [2007] 1 LNS 675 HC ***(refd)***

Law Wai Duen v. Boldwin Construction Co Ltd [2001] HKCA 284 ***(refd)***

Mageswary Kannaiah v. Vithylingam Mayandy & Anor [2009] 9 CLJ 40 HC ***(refd)***

G *Mirza Mohamed Tariq Beg Mirza HH Beg v. Perunding Pakarmedia Sdn Bhd [2009] 10 CLJ 273 HC* ***(refd)***

Oxford Legal Group Ltd v. Sibbasbridge Services Plc and Another [2008] EWCA Civ 387 ***(refd)***

Raja Zainal Abidin Raja Hj Tachik & Ors v. British-American Life & General Insurance Bhd [1993] 3 CLJ 606 SC ***(refd)***

H *Tan Kim Hor & Ors v. Tan Chong Consolidated Sdn Bhd [2008] 1 LNS 741 CA* ***(refd)***

Welch v. Britannia Industries Pte Ltd [1993] 1 SLR (R) 64 ***(refd)***

Legislation referred to:

Companies Act 1965 (since repealed), s. 167(1), (3), (6), (7)

Companies Act 2016, s. 245(9)

I Rules of Court 2012, O. 1A, O. 2 rr. 1, 3, O. 6 r. 2, O. 7 r. 3(1), O. 18 r. 19(1)(b), (d)

Companies Act (Cap 50) [Sing], s. 199

For the plaintiff - Lavania Kumaraendran & Jessica Leong; M/s Thomas Philip
For the defendant - Jason Ng Kau, Tan Keng Soon & Ng Yeow Wei; M/s Jason Ng & Partners

Reported by Najib Tamby

JUDGMENT

Mohd Nazlan Ghazali J:

Introduction

[1] This case concerns an application by a director by way of an originating summons (encl. 1) to inspect the financial records of the defendant company he serves, and for the appointment of an auditor to assist him for such purpose. The defendant sought (in encl. 3) to strike out the originating summons.

[2] This striking out application was heard earlier than and separately from the originating summons. The arguments for both applications presented by the parties are however very substantially similar, and are reliant on the same affidavits.

[3] I dismissed the striking out application of the defendant, but granted the inspection request for the plaintiff at the conclusions of both hearings, and highlighted the key grounds for my decisions, respectively. This judgment contains the full reasons for both decisions.

Key Background Facts

[4] The plaintiff is a director serving the Board of Directors of the defendant. He was appointed a Managing Director on 2 November 2012. There are two other directors on the Board of the defendant, namely Lee Chiah Cheang and Sin Kiong Fatt.

[5] On 11 November 2013, the directors resolved for the defendant to obtain a loan facility from Public Bank for the amount of RM8.5 million. In pursuance of a number of directors' circular resolutions all dated 13 February 2014, it was determined that the signatures of any two of the defendant's directors would be sufficient to validate a cheque payment of the defendant in respect of payments exceeding RM5,000.

[6] A significant development occurred when the Board, specifically the two directors of the defendant other than the plaintiff, by way of a directors' circular resolution dated 28 August 2015 established an Executive Committee ("EXCO") to the effect that certain business transactions or dealings for the defendant could only be pursued by the directors if authorised by the EXCO, for which Lee Chiah Cheang had been made its chairman.

[7] The plaintiff claimed that he had stopped signing cheques and more pertinently was denied access to the defendant's accounting and financial documents. At the defendant company's annual general meeting on 30 August 2016, the plaintiff raised his objection to Lee Chiah Cheang's proposal to utilise the Public Bank facility for contract works or the acquisition of a small company or to finance out the loan.

[8] On 18 November 2016, the plaintiff unilaterally issued a letter to Public Bank Bhd, United Overseas Bank (Malaysia) Bhd, OCBC Bank (Malaysia), AmBank Islamic Bhd and Industrial and Commercial Bank of China (Malaysia) Bhd to requesting these institutions to freeze the defendant's monies held in those respective banks (the "impugned acts"). These impugned acts are contended by the defendant to be the principal source of its present dispute with the plaintiff. This is also given the fact that on even date, the plaintiff had also written to the directors and the company secretary of the defendant company, expressing his intention to dispose of his shareholding to one Pecol Industries Sdn Bhd.

[9] AmBank Islamic did act on the plaintiff's request and froze the dealings in the defendant's bank account maintained thereat. The defendant maintains that the impugned acts were unacceptable and characterised them as acts of treason and sabotage against the defendant's financial infrastructures.

[10] Thus, the defendant decided to serve the plaintiff with a show cause letter dated 23 November 2016, demanding an explanation from the plaintiff as to the reason for the plaintiff's impugned acts. The notice that a Board meeting would be held on 8 December 2016 was also given to the plaintiff.

[11] In reaction to and in preparation for the meeting, the plaintiff on 5 December 2016 procured his lawyer to request from the defendant company a copy of the updated management accounts of the company to be made available at the upcoming Board meeting, and for an independent auditor be allowed to inspect certain accounting records, particularly in respect of cheque images of the defendant company from 31 August 2016 onwards.

[12] The response from the defendant dated 7 December 2016 stated that it reserved its right pending legal advice, whilst proceeding on the same day to hold the domestic inquiry against the plaintiff who chose not to attend. At the Board meeting held the day after as scheduled, the plaintiff handed over an explanatory statement pertaining to the impugned acts. At the Board meeting, the Board accepted the disciplinary panel's recommendation for the termination of the employment of the plaintiff, given the panel's finding of the plaintiff guilty of gross misconduct in respect of the impugned acts. The Board then resolved to suspend the directorship of the plaintiff.

[13] Hence, the instant proceeding initiated by the plaintiff to enforce his inspection rights as a director of the defendant. Thus by encl. 1, he seeks to achieve the following:

> 1. Supaya Defendan melalui pengarah-pengarah, juruakaun ('accountant'), juruaudit dan/atau mana-mana individu yang bertanggungjawab bagi yang sama membenarkan Plaintif dengan serta-merta, dan dalam apa keadaan sekalipun dalam masa tidak lebih dari 7 hari daripada tarikh perintah ini, memeriksa kesemua akaun-akaun dan/atau tertakluk kepada, imej-imej cek yang dikeluarkan oleh Defendan, Akaun Untung Rugi, Ledger, Kunci Kira-kira Defendan dan/atau Akaun Pentadbiran ('Management Account') bagi tahun 2015 hingga 2016;
>
> 2. Supaya Defendan serta-merta, dan apa keadaan sekalipun dalam masa tidak lebih daripada 7 hari daripada tarikh perintah ini membenarkan juruaudit bebas (independent auditor) yang diluluskan menurut peruntukan seksyen 8 Akta Syarikat 1965, seperti yang dilantik oleh Plaintif, untuk memeriksa kesemua akaun-akaun dan/atau rekod perakaunan Defendan termasuk, tetapi tidak tertakluk kepada, imej-imej cek yang dikeluarkan oleh Defendan Akaun Untung Rugi, Ledger, Kunci Kira-kira Defendan dan/atau Akaun Pentadbiran ('Management Account') bagi tahun 2015 hingga 2016 untuk dan bagi pihak Plaintiff; …

Primary Contentions Of The Plaintiff

[14] The plaintiff proffers a number of grounds as justifications for commencing this application. Fundamentally, it is premised on the plaintiff's statutory right as a director to have access to the accounts and books of the defendant under s. 167(3) of the Companies Act 1965, which had been denied to the plaintiff. Access would only be possible with the approval of the EXCO. The plaintiff has serious concerns that the Public Bank facility is being misused for purposes unrelated to the defendant's business.

[15] At the same time, the plaintiff also raised serious questions about what he saw as the steady deterioration of the defendant's financial standing over the past year, especially in the following areas:

(a) An increase in trade receivables amounting to some RM7,342,350 from the year 2015 to 2016;

(b) A reduction in bank and cash balances of approximately RM2,000,000 from the year 2015 to 2016;

(c) A negative amount shown in the net cash flow statements; and

(d) An increase in the total operating expenses by RM2,174,303.

[16] The plaintiff further submitted that the recent breakdown of the relationship between the plaintiff and the other directors of the defendant, and the plaintiff's overall suspicion on the state of affairs of the financials of

A the defendant makes the case for inspection all the more justified. The plaintiff cited the High Court decision in *Ho Yee Chin v. Ho Min Hao & Ors* [2016] 6 CLJ 728 which observed thus:

> [23] There is judicial *dicta* to the effect that when there is suspicion and lack of co-operation, a director is all the more entitled, perhaps even
B obliged, to inspect company's accounts to protect the interests of the company and its shareholders. The right is not only to be exercised or the duty imposed when there is harmony within the company ...

[17] The plaintiff is also particularly concerned about the Public Bank facility not just given the assertion that its use could be for purposes unrelated
C to the business of the company. The concern is also founded in the fact that he is a personal guarantor of the said facility.

Principal Assertions Of The Defendant

[18] The defendant's key complaint concerns the action on the part of the
D plaintiff in committing the impugned acts. It asserted that the impugned acts of the plaintiff were committed out of selfish or personal interest and were not in the best interest of the defendant company. Significantly, the defendant argued that this was also a breach of fiduciary duty on the part of the plaintiff. For it was contended that if the plaintiff was successful, the implications
E would have been nothing less than catastrophic in the sense that the defendant's operations would likely have ceased, and the employees, suppliers and relevant third parties would not be paid. The defendant would also not be able to receive monies through those accounts.

[19] The defendant further submitted that the plaintiff had refused to
F disclose his reasons for those impugned acts, despite the defendant having afforded many opportunities for him to do so. Instead, the plaintiff, according to the defendant, had chosen to take a hostile stance towards the other directors.

[20] In addition, the defendant noted that the plaintiff also intended to
G dispose of his shares in a number of companies, namely, Geovest Sdn Bhd, Ideal Standard Sdn Bhd and Adwize Sdn Bhd, all to Pecol Industries Sdn Bhd ("Pecol Industries") which are companies related to the defendant. The defendant highlighted that in his letters to the various banks as part of the impugned acts, the plaintiff had copied the same to Pecol Industries which
H is unrelated to the defendant. This, according to the defendant, constituted yet another breach of the plaintiff's fiduciary duties by disclosing sensitive information relating to the defendant to a third party.

[21] Thus, the Board of the defendant company had rightfully suspended the plaintiff's directorship in order to control and contain the damage which
I the plaintiff may potentially inflict on the defendant if left unchecked.

[22] It is the principal contention of the defendant in its striking out application as well as in its opposition to the originating summons that being so suspended from the directorship, the plaintiff had no *locus standi* to initiate

this originating summons. The defendant further averred that the plaintiff should have first procured a declaration to invalidate the decision of the Board of the defendant to suspend the directorship of the plaintiff instead of commencing this action which is thus premature. In respect of encl. 3 - the striking out application, however, the defendant, as the applicant, had also raised one other objection concerning O. 7 r. 3 of the Rules of Court 2012 ("RC 2012") against the originating summons.

[23] I will next consider these contentions of the parties in respect of both the principal application by the plaintiff for inspection rights and the application by the defendant to strike out the former since these are premised on the same averments and submissions, apart from the objection pertaining to O. 7 r. 3, which I shall examine first. But before that, I need to briefly refer to the law on striking out which concerns encl. 3.

The Law On Striking Out

[24] This is a striking out application. So I should also briefly refer to the trite law on striking out. The leading authority on O. 18 r. 19(1) of the Rules of Court 2012 ("the RC 2012") is the Supreme Court decision in *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7; [1993] 3 MLJ 36, and in particular the following part of the judgment of Mohamed Dzaiddin SCJ (later Chief Justice):

> The principles upon which the Court acts in exercising its power under any of the four limbs of O. 18 r. 19(1) Rules of the High Court are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule (per Lindley M.R. in *Hubbuck v. Wilkinson* [1899] 1 QB 86, p. 91), and this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it "obviously unsustainable" (*Attorney-General of Duchy of Lancaster v. L. & N.W. Ry. Co.* [1892] 3 Ch. 274, CA). It cannot be exercised by a minute examination of the documents and facts of the case, in order to see whether the party has a cause of action or a defence (*Wenlock v. Moloney* [1965] 1 WLR 1238; [1965] 2 All ER 871, CA.). The authorities further show that if there is a point of law which requires serious discussion, an objection should be taken on the pleadings and the point set down for argument under O. 33 r. 3 (which is in *pari materia* with our O. 33 r. 2 Rules of the High Court (*Hubbuck v. Wilkinson) (supra)*. The Court must be satisfied that there is no reasonable cause of action or that the claims are frivolous or vexatious or that the defences raised are not arguable.

[25] It is therefore well-established that the power of the court to strike out under the four grounds of O. 18 r. 19(1) is to be exercised when it can clearly be determined that a claim or answer is *prime facie* obviously unsustainable. The courts should also scrutinise the evidence in the application with a fine tooth comb (see the Supreme Court decision in *Raja Zainal Abidin Raja Haji Tachik & Ors v. British-American Life & General Insurance Bhd* [1993] 3 CLJ 606; [1993] 3 MLJ 16).

[26] The defendant anchored its striking out application in encl. 3 primarily on the grounds that the instant originating summons is vexatious and frivolous under O. 18 r. 19(1)(b) or that it is an abuse of process under r. 19(1)(d). I will as such next examine the arguments presented by parties and the affidavit evidence made available to determine whether this application is meritorious and deserving of the striking out of the originating summons.

Evaluation And Findings By This Court

For Encl. 3 (strike-out) - Non-adherence To O. 7 r. 3

[27] The thrust of the defendant's application to strike out the plaintiff's originating summons pursuant to O. 18 r. 19(1)(b) and (d) of the RC 2012 and/or under the inherent jurisdiction of this court is two-pronged. Specifically, the originating summons is flawed by reason of the plaintiff's non-compliance with O. 7 r. 3, and more fundamentally for its lack of *locus standi* given the fact the plaintiff had been suspended as a director. For clarity, in respect of encl. 1, the key resistance proffered by the defendant against the originating summons is the same primary contention of lack of *locus standi* on the part of the plaintiff.

[28] It is apposite that I set out the requirements of O. 7 r. 3 of the RC 2012. The provisions states as follows:

> 7 Originating summonses: General provisions
>
> 3. Contents of originating summons (O. 7 r. 3)
>
> (1) Every originating summons shall include a statement of the questions on which the plaintiff seeks the determination or direction of the Court or, as the case may be, a concise statement of the relief or remedy claimed in the proceedings begun by the originating summons with sufficient particulars to identify the cause or causes of action in respect of which the plaintiff claims that relief or remedy.
>
> (2) Order 6, rule 2, except for subparagraphs (1)(a) and (b) shall apply in relation to an originating summons as it applies in relation to a writ.

[29] It is clear that O. 7 r. 3(1) of the RC 2012 requires the plaintiff to include in its originating summons first, a statement of the questions on which the plaintiff seeks the determination or direction of the court, and secondly, sufficient particulars to identify the cause or causes of action of the plaintiff. I do not see how the substance of what had been set out in encl. 1 fails these requirements. It is true that the originating summons contains primarily the particulars the prayers sought by the plaintiff. But from the prayers, it is quite manifest that he is seeking to compel the defendant to permit his exercise his right under s. 167(3) of the CA as a director of the defendant to inspect documents of the company.

[30] What appears to be the main complaint of the defendant is that the originating summons did not even include the grounds in support of what the plaintiff prays for. In my view, this factor alone cannot justify the striking out of the originating summons. First, the language in O. 7 r. 3 does not specify that grounds for the application must be stated. But I accept that development of case-law authorities on the point has witnessed the necessity for the applicant to set out the grounds in support, and this has invariably been accepted as a requirement for a defect-free originating summons. But its non-inclusion cannot necessarily be fatal.

[31] Secondly, the defendant relies on the case of *Dr Woo Kin Chong v. Mary Ou Holdings Sdn Bhd* [1997] 5 CLJ 164; [1998] 2 MLJ 167 which held that a notice of motion without grounds was incomplete and irregular and could not be cured by the supporting affidavit. The plaintiff on the other hand submitted on decisions such as *Karisma Saujana Sdn Bhd v. Albert Antoni Tass* [2007] 1 LNS 675; [2008] 8 MLJ 693 and the Court of Appeal decision in *Amirthanayaki Kumarasamy v. Lembaga Kelayakan Profesion Undang Undang Malaysia* [2010] 6 CLJ 593; [2010] 1 MLJ 656 which had emphasised on the preference not to strike out on the basis of technical defect at the expense of the merits of the case, especially where substantial injustice could not be demonstrated.

[32] I would further also agree with the now familiar approach of the High Court in this regard, such as found in the case referred to by the plaintiff of *Jan De Nul (Malaysia) Sdn Bhd & Anor v. Vincent Tan Chee Yioun & Anor And Other Cases* [2016] 1 LNS 1234; [2016] MLJU 914, where a preliminary objection against the non-inclusion of the grounds or the particulars relied upon in an originating summons was dismissed because the defendant failed to establish that the said non-compliance had occasioned a substantial miscarriage of justice to the defendant or caused prejudice that may not be compensated by cost.

[33] There is another non-compliance by the plaintiff. This concerns O. 6 r. 2 of the RC 2012 (read together with O. 7 r. 3) which requires the plaintiff to endorse in its originating summons, the plaintiff's own address and its solicitor's name or firm and a business address of his within the jurisdiction. In encl. 1, no address of the plaintiff could be found.

[34] However, in the instant striking out application before me, in respect of the non-inclusion of either the grounds for the originating summons, or the plaintiff's address, the defendant has not mentioned any form of prejudice or injustice that had been occasioned by the same, let alone one that had been suffered by the defendant as a consequence. It is obvious that the defendant is fully cognizant of the nature and basis of the application initiated by the plaintiff (despite the omissions) which really pertains to the exercise of his right as a director of the defendant to inspect company documents. Whether he can exercise such right now that his directorship is suspended is the crux

of the dispute. The defendant had even filed a striking out application. It would better promote the ends of justice that this very issue be adjudicated on its merits instead of the originating summons suffering from a premature and untimely demise by reason of purely technical irregularities.

[35] In addition, I would also take into account the fact that the defendant had not previously raised this objection when the originating summons was first filed and served, or even in the defendant's affidavit in support of its own striking out application. The omissions were unfortunate, if not deplorable, but I accept the explanation by the plaintiff, expressed by his counsel at the hearing, that the failure was unintentional and purely due to an oversight on their part.

[36] As such, in my judgment, these non-compliances on the part of the plaintiff are neither fatal nor incurable. They amount to a mere irregularity which ought not to nullify the originating summons of the plaintiff within the contemplation of O. 2 r. 1 for such defects have also not been shown to have caused any miscarriage of justice or prejudice as required by O. 2 r. 3. They do not affect the essential justice of the case. For after all, it is all too trite that the court must have regard to the overriding interest of justice (see O. 1A of the RC 2012).

[37] This thus does not meet the threshold requirement that the originating summons must be so obviously unsustainable on account of these irregularities in order to justify a striking-out.

Enclosures 1 And 3 - Absence Of Locus Standi Given The Suspension

[38] This is the true essence of the contention between the parties. The plaintiff argues that his purported suspension does not have any bearing on his right as a director to inspect company documents. The defendant maintains that as he is suspended, the plaintiff cannot enforce his right to such extension.

[39] Before I consider the principal issue on the validity and effect of the suspension, I should briefly refer to the submission of the plaintiff that even the suspension itself may be disputed. For there is what appears to be a conflicting version of the Board meeting minutes. Crucially, on the one hand, there was a duly signed Board meeting minutes that the plaintiff's directorship was suspended following a determination of misconduct against him in the domestic inquiry. But on the other hand, the draft minutes prepared by the company secretary recorded that:

> The Secretary advised that the Board do not have the power to suspend the directorship of Mr Kwan Teck Hian in the meeting. Therefore, the Chairman will seek for the legal advice for this matter.

[40] It is not clear that there is to start with a valid resolution of the Board which authorises the suspension of the plaintiff. In the absence of one, the suspension would clearly be without any legal basis whatsoever.

[41] Further, even if there was such a resolution by the Board of the defendant company, its true legal basis may still be challenged. This is because unlike in cases involving the removal of directors, there are no provisions in either the articles of association of the defendant company or in the Companies Act 1965 which make reference to such authority on the part of the Board to suspend one of their members. It is precisely for this reason that the plaintiff contends that his rights and obligations as a director still remains.

[42] The defendant's argument that the fact that neither do the articles of association or the Companies Act 1965 expressly prohibit the suspension meant that it had the power to suspend does not assist much in the development of the argument on this issue.

[43] The issue therefore boils down to whether the law permits suspension of directors. If the answer is in the positive, then the question would be whether the suspension has the effect of also suspending the director's right to inspect company documents as well. The defendant's stance on these issues is clear. It maintains that the suspension must necessarily mean the temporary removal of all rights otherwise previously accorded to the plaintiff as a director of the defendant.

[44] The defendant relied on the case of *Fong Poh Yoke & Ors v. The Central Construction Company (Malaysia) Sdn Bhd* [1998] 4 CLJ Supp 112, where Abdul Malik Ishak J (as he then was) held as follows:

> The defendant's board of directors had the authority to suspend the plaintiff in the special circumstances of this case. Though the right to remove a director rests with the shareholders at the general meeting, the lesser right to suspend the 5th plaintiff must necessary remain with the board of directors, until such time as the shareholders may determine whether to re-elect him or not. It ought also to be seen that the defendant's board of directors here, in suspending the 5th plaintiff, had acted *bona fide* in the interest of the defendant.

[45] As against that decision however, the plaintiff referred to another, and later High Court decision in *Jerry Ngiam Swee Beng v. Abdul Rahman Mohd Rashid & Anor* [2003] 3 CLJ 739; [2003] 6 MLJ 448, which appears to have taken the contrary position. The relevant part of the judgment of Vincent Ng J (as he then was) reads as follows:

> The court is not clothed with the power to suspend a director. The Companies Act 1965 does not make provision for the suspension of directors but for their removal and disqualification in certain circumstances. A suspension would give "holidays to directors with respect to their statutory functions and duties under the Act ..."

[46] I accept that the Board, having a fiduciary duty to act in the best interest and welfare of a company in question must surely be empowered to prevent a recalcitrant director from potentially further damaging the company.

[47] However, I emphasise that in situations where a director fails in the proper discharge of his powers as a director, when the powers are exercised for ulterior or improper purposes, which are invariably not in the interest of the company or when his act injures the interest of the company he was supposed to serve, the Board has the right to seek for his removal or for action be taken for such transgressions. However, a suspension of directorship *per se* pending removal is at best only an administrative arrangement. In the absence of any legal basis for suspension in the articles, the rights, duties and powers of a company director cannot be affected or whittled down, what more suspended altogether by the mere decision of the Board to effect the 'suspension'.

[48] But this does not mean that the powers of the director alleged to be in default cannot be restricted. The Board may commence a suit against the director, say for breach of statutory and fiduciary duties, and if necessary, apply for appropriate interim injunctive relief to ensure non-interference with company matters pending removal. I agree that the Board or the other directors have the fiduciary duty to act in the interest of the company which under such circumstances, may even include the need to restrain the miscreant director from effectively performing his own director's duties given the breach by the latter. But any action by the directors in this regard must be founded on surer premise mandated by law especially given the fact that such action seeks to constrain the exercise of a statutory right by the director in question.

[49] Thus, for certain specific statutory rights such as the inspection right under s. 167 of the CA relevant to the instant case, the law is already well-established in that the other directors may legitimately refuse to allow inspection by the applying director, despite the right entrenched in the statute, in cases where the director in question is shown to have acted contrary to the interest of the company or to the proper performance of his director's responsibilities. It is thus unnecessary to invoke what is in essence of doubtful basis, the powers of the Board to resolve to suspend a director in the sense of suspending wholesale his rights and duties as a director.

[50] A suspension of directorship brings into play a host of uncertainties which are inimical to the proper and efficient management of a company by its Board of Directors. After all, it makes little sense for a director to be denied the exercise of his rights and powers such as access to company documents and attendance at Board meetings without also excusing him from performing his duties as a director which brings with it the potential liabilities for the breach of such duties.

[51] The rights and the responsibilities operate hand in hand. It is common sense that a director cannot be faulted for a breach of director's duty if he is prevented from exercising his powers as a director. This I venture to add is what was meant in *Jerry Ngiam Swee Beng* when a suspension of directorship is construed as giving "holidays" to the director in question.

That is undesirable. It creates an unjustified category of those validly appointed as company directors, under the law and in fact, instead not to be directors during the period of suspension. Thus, for example, they would be immune to legal action, even criminal prosecutions if they engage in acts or conduct that would have been prohibited if they were directors. The justice system cannot and does not function in this manner. Incoherence and confusion cannot be allowed to reign supreme.

[52] Further, parties dealing with the company in question would not know the status of the director who may have been suspended. Just like in the instant case, the company search shows that plaintiff to be a director. Third parties would thus be perfectly within their legal rights to rely on the well-established indoor management rule in their dealings with the plaintiff as a director representing the defendant company. If the suspension is given full effect to, such reliance would be bereft of basis.

[53] As such, any action to be taken to restrict the powers of a director must be based on clear and specific legal provisions. Resorting to suspension of directorship is woefully inadequate and ought to be avoided. The court should deprecate and not countenance such cause of action. Other than the well-entrenched process of removal of directors and disqualification in certain liquidation situations, most modern articles also incorporate provisions sanctioning automatic disqualification of directors. If these do not apply, the company and the Board must consider other legal options to achieve the desired outcome. They do not, however, include suspension of directorship.

[54] For completeness, I must add that my ruling against company resorting to suspending directors is applicable only to a situation where what is sought to be suspended are the rights and duties vested in the office of a director. If the director is also an executive, with the additional role as an executive director, managing director or chief executive director, suspension of the executive function is not objectionable. Such suspension process would be for all intents and purposes no different from part of the disciplinary powers exercised by the company against executives and other employees accused of misconduct, predicated on the contract of employment between parties. In fact, this was also the case for the plaintiff for his "employment" was also terminated just before his suspension was made effective.

[55] In the instant case, there is lack of clarity whether what was sought to be suspended was the exercise of the function of managing director by the plaintiff instead of concerning purely his role as a company director. But even if that were the case, it would be a much greater reason to not deny the inspection rights of the plaintiff as a director.

[56] As such, my answer to the question posed by the defendant is as follows. The plaintiff could not legally and validly be suspended of his director's powers and responsibilities as a director of the defendant company. Thus, the fact that the plaintiff was suspended does not in any event have the

effect of "suspending" the exercise of his rights and responsibilities as a director. Accordingly, the objection on the alleged absence of *locus* on the part of the plaintiff who has been suspended as a director as raised by the defendant is devoid of substance and is untenable. The contention that the suspension meant that the exercise of inspection rights would also be unavailable during the period of the suspension is wholly misconceived and unmeritorious. Thus, as the principal basis of the defendant's striking-out application is the lack of *locus standi* which has been shown to be unsustainable, encl. 3 cannot succeed and must fail. Correspondingly given the presence of *locus standi*, encl. 1 on the application for inspection is therefore competent to be pursued.

[57] This leads to the one other important question which is whether the plaintiff is entitled to the exercise of his right to inspect company information. I have taken the view that the purported suspension does not operate to suspend the rights and responsibilities of a director. As such, the issue of whether the inspection right could be validly refused falls to be determined in accordance with the law governing such access rights of directors. This is the aspect which I will now address.

The Law On Inspection Rights Of Directors

[58] The company law in this country has clearly established the governing requirements relating to the inspection rights of company documents by its own directors.

[59] The starting point must be the key legislative provisions. These are found in the Companies Act 1965 ("the CA"), primarily in s. 167, the relevant parts of which read as follows:

> 167. Accounts to be kept
>
> (1) **Every company and the directors and managers thereof shall cause to be kept such accounting and other records** as will sufficiently explain the transactions and financial position of the company and enable true and fair profit and loss accounts and balance sheets and any documents required to be attached thereto to be prepared from time to time, and shall cause those records to be kept in such manner as to enable them to be conveniently and properly audited.
>
> ...
>
> (3) The records referred to in subsection (1) shall be kept at the registered office of the company or at such other place in Malaysia as the directors think fit and **shall at all times be open to inspection by the directors.**
>
> ...
>
> (6) The Court may in any particular case order that the accounting and other records of a company **be open to inspection by an approved company auditor acting for a director**, but only upon an

undertaking in writing given to the Court that information acquired by the auditor during his inspection shall not be disclosed by him except to that director.

(7) If default is made in complying with this section **the company and every officer of the company who is in default shall be guilty of an offence against this Act**.

Penalty: Imprisonment of six months or five thousand ringgit or both.

(emphasis added)

[60] This statutory provision prescribes the obligation of every company and director of the company to keep accounting records under s. 167(1), the right of the directors of the company to inspect the accounting records (s. 167 (3)), and the court may order inspection of the accounting records by an auditor acting for a director (s. 167(6)).

[61] It is of relevance to note that these provisions are repeated in the new Companies Act 2016. They are now contained in the new s. 245. As such, case law authorities, especially local decisions, some of which will be highlighted herein, would continue to be of direct relevance when interpreting situations which are subject to the new Companies Act 2016. The one significant substantive change introduced in the Companies Act 2016 are the considerably heavier penalties for contravention of the requirements of s. 245. From a fine of a mere RM5,000 or a term of imprisonment of six months or both, as stated in s. 167(7) of the CA, to a maximum fine of RM500,000 or a jail term not exceeding three years or to both, as stipulated in s. 245(9) of the Companies Act 2016.

Virtually Absolute Right Of Inspection

[62] In relation to these statutory provisions, the courts have held that it is settled law that directors have unrestricted and direct access to such company information. The right of a director to inspect documents of a company is mandatory in order to enable a director to discharge his responsibilities fairly and equitably for the benefit of the company and the shareholders.

[63] The leading authority on the subject to date is the Court of Appeal in *Tan Kim Hor & Ors v. Tan Chong Consolidated Sdn Bhd* [2008] 1 LNS 741; [2009] 2 MLJ 527 which further affirmed the position in law as follows:

[28] In our view, s 167(6) is intended to facilitate and liberalise, and is not meant to impede, the right of inspection. Indeed, almost unbridled powers are conferred upon the court to give effect to the directors' right of inspection. Clearly, it is within the powers of the court to allow the plaintiffs to furnish a fresh undertaking by the auditor in terms as required by the court, by addressing it to the court and by deleting therefrom the words relating to the appointed servants/agents. This is especially so after the learned judge had

A arrived at a specific decision that the defendant had, in the first instance, failed to discharge its burden to show that the plaintiffs' inspection would result in any detriment to the interests of the defendant. That is a reaffirmation that the right of inspection by the plaintiffs as directors of the defendants pursuant to s. 167(6) is 'absolute'.

B

(emphasis added)

[64] Low Hop Bing JCA, delivering the judgment of the Court of Appeal also referred to the common law and a leading Singapore Court of Appeal authority on the subject in the following manner:

C [16] The relevant established principles have been succinctly stated by the Singapore Court of Appeal in *Wuu Khek Chiang George*. There, the appellant, a director of the respondent, took out an application under s 199 of the Singapore Companies Act (equipollent to our sec. 167) for an order requiring the respondent to inspect its accounting and financial records. The High Court judge dismissed the D application. After reviewing a long line of authorities, the Court of Appeal allowed the appellant's appeal and held, *inter alia*, that:

(1) **the right of a director of a company to inspect its accounting and other records is a right existing at common law and is recognised in s. 199 of the Companies Act**. Such right is a E concomitant of the fiduciary duties of good faith, care, skill and diligence which the director owes to the company, and as such, like other rights and powers, must be exercised for the benefit of the company. The obligation of the company to allow inspection by its director is mandatory;

F (2) *this right has been described as being 'absolute'. A director is prima facie entitled to inspection and is not required to demonstrate any particular ground or 'need to know' as a basis: Molomby*. So long as the right is exercised for the proper performance of the director's duties to the company and not with a view to causing any detriment to the company, it is in that sense 'absolute': see eg, *Dato Aw* G *Kow v. Haw Par Bros (Pte) Ltd* [1972] 2 MLJ 225; [1972-1974] SLR 391, *Haw Par Brothers v. Dato Aw Kow* [1973] 2 MLJ 169; [1972-1974] SLR 183; *Leong Sun Wing v Wah Hup Engineering Works Sdn Bhd (No 2)* [1977] CSLR VII [1003]; *Molomby*; *Welch & Anor v. Britannia Industries Pte Ltd* [1993] 1 SLR 673; *Edman v. Ross* (1922) 22 SR (NSW) 351; and *Conway & Ors v. Petronius Clothing Co Ltd* H *& Ors* [1978] 1 All ER 185; [1978] 1 WLR 72;

(3) there is no residual discretion in the court to refuse inspection. Where the court bars a director from exercising his right of inspection, it is not in fact exercising a residual discretion, but is in such an event satisfied on the basis of the evidence before I it that the director's intention is to use the information obtained for ulterior purposes such as with a view to causing detriment to the company and that the director is thus abusing the confidence reposed in him; *Berlei Hestia (NZ) Ltd v Fernyhough* [1980] 2 NZLR 150 per Mahon J;

(4) *the right of a director to inspect the books and records of the company flows from his office as a director and enables him to perform his duties as a director. The corollary of this is that the right will be lost where it is exercised not to advance the interests of the company but some other ulterior purpose to injure* the company: *Edman v. Ross, Molomby; Deluge Holdings Pty Ltd & Anor v. Bowlay & Ors* [1991] 9 ACLC 1486; *Welch & Anor; Re Geneva Finance Ltd (Receiver and Manager Appointed)* (1992) 10 ACLC 668; and *Paul Nicholson lwn Faber Medi-Serve Sdn Bhd dan lain-lain* [2002] 1 MLJ 355.

(emphasis added)

[65] The Singapore Court of Appeal in *Wuu Khek Chiang George v. ECRC Land Pte Ltd* [1999] 3 SLR 65 also affirmed that (having regard to common law and s. 199 of the Singapore Companies Act which is in *pari materia* to our s. 167 of the CA) the obligation of the company to allow inspection by its director is mandatory, and that the right is absolute so long as the right is exercised for the proper performance of the director's duties to the company and not with a view to causing any detriment to the company. A director is *prima facie* entitled to inspection and does not have to show any particular ground as a basis.

[66] There is no conceptual difficulty in this proposition. The directors are accountable under the law to manage the company they serve as directors. If nothing else, plain common sense will dictate that it is inconsistent with that duty if their access to the documents and records of the very company they are bound to manage is constrained. Thus in *Mirza Mohamed Tariq Beg Mirza HH Beg v. Perunding Pakarmedia Sdn Bhd* [2009] 10 CLJ 273 it was also held that a director is not obliged under the law to justify his request to inspect the accounts of the company.

[67] As such, a director's right under s. 167 of the CA to inspect the accounting records is an affirmation of a director's right already existing at common law. A corollary of the absolute right to inspect must mean that the company is obliged to ensure that such common law and statutory right can be exercised by the director unimpeded. A failure on the part of the company or of other directors to allow the exercise of the inspection rights of the requesting director would constitute an offence and attract the application of s. 167(7) of the CA (s. 245(9) of the Companies Act 2016). If convicted, the company and the directors in default may be liable to the punishments as I highlighted earlier.

Director's Inspection Right Can Only Be Overridden By Clear Proof Of Ulterior Purposes

[68] Since the basis of the legal right of a director to inspect the books and records of the company emanates from his office as a director to enable him to perform his duties as a director, the same right will be forfeited where it

is exercised not to advance the interests of the company but some other ulterior purpose to injure the company (see *Edman v. Ross, Molomby; Deluge Holdings Pty Ltd & Anor v. Bowlay & Ors* [1991] 9 ACLC 1486).

[69] The English Court of Appeal in *Oxford Legal Group Ltd v. Sibbasbridge Services Plc and Another* [2008] EWCA Civ 387 had made the observation that if it is clearly shown that a director was using the right to inspect for an improper purpose, the court has no power to assist him to obtain access. The court could thus not facilitate the right be invoked for a purpose for which it was not conferred. Conversely, it rightfully shall not be open to the court to refuse its assistance if it has no reason to believe, in the absence of clear proof, that the requesting director, like the plaintiff herein, is using the right to inspect for an improper purpose.

[70] The Court of Appeal in *Dato' Tan Kim Hor & Ors v. Tan Chong Consolidated Sdn Bhd* also made clear that a director's right to inspect the accounting records is absolute in the sense that he is entitled to inspection without subject to any requirement to provide any reason for the inspection. The courts do not even have any residual discretion to refuse inspection by a director. A director's statutory right of inspection may only be refused if the director is exercising his right of inspection for some ulterior purpose or to injure the company.

[71] It would be a complete misconception of the true meaning of the directors' inspection rights if the company seeks to qualify the exercise of such inspection right. It would thus be wholly unwarranted for a company to demand as a condition permitting inspection for the requesting director to execute a non-disclosure or confidentiality agreement precisely by reason of the trite legal position that the director's fiduciary duties to the company already impose strict duties against any infringement of confidentiality or injury to the company.

[72] Crucially, it is for the company resisting the inspection to demonstrate that the director is exercising his right of inspection for some ulterior or improper purpose or to injure the company. And in order to achieve this, the company must show clear proof that the director is exercising his right for inspection for such improper purposes. Thus, Low Hop Bing JCA in *Dato' Tan Kim Hor & Ors v. Tan Chong Consolidated Sdn Bhd* stated:

> ... It is for the defendant to show 'clear proof' and to satisfy the court 'affirmatively' that the grant of the right of inspection would be for a purpose detrimental to the interests of the company. There must be a 'real ground' that the right would be abused and that substantial harm would be caused to the company thereby …

[73] The defendant must demonstrate clear proof that the inspection is for an improper purpose. In the instant action, the case of the plaintiff is simple enough. In essence, the plaintiff as a director of the defendant company has an absolute right to inspect the accounting records. But the defendant has denied the plaintiff his statutory rights to have access to such information.

[74] As has been made clear earlier, s. 167(1) of the CA plainly gives the court the power to permit access to company records by an approved company auditor, on behalf of the requesting director. A director has the right to access such documents, and by virtue of his office, does not need to provide justification why he seeks access. Instead, it is for the company mounting a resistance to offer clear proof that the inspection is for improper purposes, injurious to the company, or that the exercise of such rights is incompatible with remit of the director's fiduciary and statutory responsibilities. The crucial question therefore is to consider whether the defendant has shown clear proof of such deficiency to justify denial of access.

Defendant Failed To Show Ulterior Purposes

[75] It should be stated that the various affidavits of the parties in dispute in the instant case contain various and many allegations and counter allegations. In this context, it would not be the duty of the court to examine such averments and disputations. This is in line with the decision of the Singapore High Court in *Welch v. Britannia Industries Pte Ltd* [1993] 1 SLR (R) 64, which held as follows:

> ... It is not for the Court at the hearing of an application (to inspect accounts and records) to go into the disputes between the contending parties and I will not deal with the charges and counter charges ... beyond saying that they show clearly that the plaintiffs were concerned over the company's account before they made the application.

[76] Nevertheless, I shall consider the principal assertions made by the defendants in challenging the instant request. As stated earlier, the resistance mounted by the defendant can only succeed if clear proof is given of the alleged ulterior motive on the part of the plaintiff.

[77] The basis relied on by the defendant in suspending and thus, in this case, denying the plaintiff access to company documents is largely the impugned acts. I accept that the act of a director, without proper authority writing to banks where the defendant maintains a bank account and demanding the freezing of all these accounts is untoward and should not be condoned. It also does not represent a proper exercise of a director's statutory and fiduciary duties towards the company.

[78] But the fact of the matter is that no damage to the operations of the company had been occasioned. Only one bank proceeded to freeze. Banks would ordinarily act on instruction spelt out in company Board resolutions anyway. Further, the impugned acts, which occurred on 18 November 2016 cannot be scrutinised in isolation. They reflect an on-going dispute between the plaintiff and the other two directors. As stated earlier, the plaintiff had at the AGM on 30 August 2016 already objected to the proposal on the utilisation of the Public Bank facility. Additionally, there is no evidence that the plaintiff would likely have undertaken a similar feat like the impugned acts. In any event, counsel for the plaintiff also explained at the hearing that

A the plaintiff did not have the benefit of legal advice when committing the impugned acts. Thus, the appropriateness of the decision of the defendant to later suspend him on 7 December 2016 could be questioned.

[79] Furthermore, the plaintiff had also stated his concerns on the state of the financial health of the defendant company, raising questions, as B mentioned earlier, on the increase in trade receivables, the reduction in bank and cash balances, the negative amount shown in the net cash flow statements, and the increase in the total operating expenses. These are certainly matters for a director to be aware of and accountable to. Denial of access renders the director in question unable to perform his statutory and C fiduciary function.

[80] Above all, and most crucially, it has not been shown how the impugned acts have any real connection with the refusal to accede to the plaintiff's request for access to company financial records. The impugned acts were a past incident. It was wrong no doubt but it cannot *per se* and D without more be used as an excuse to prevent the legitimate exercise of powers and duties of directors. What exactly is the ulterior or improper motive that the defendant alleged to be the real reason for the inspection? The impugned acts are no answer at all.

E **[81]** In order to lawfully deny inspection right, the company or the Board must without exception show clear proof that the inspection by the requesting director is for an ulterior or improper motive or purpose which by definition is incompatible with the proper performance and discharge of a director's powers and duties. Merely asserting a past wrong done by the director in question without even attempting to identify the improper motive F or to establish the requisite link between such alleged motive to the application for access is so patently and grossly inadequate.

[82] After all, the arguments presented by the defendant in the affidavits affirmed on its behalf and in its written submissions concern more on explaining why a suspension was necessary. They did not focus on why G access ought to be denied, given the view of the defendant that a suspension was valid and its effects especially pertain to the suspension of all rights and duties of the plaintiff as a director.

[83] The defendant suggested that the plaintiff also had the intention to sell H his shares in a few companies. But it has not been shown in what manner the wish on the part of the plaintiff to dispose of his shares in Ideal Standard Sdn Bhd, Adwize Sdn Bhd and/or Geovest Sdn Bhd amount to an improper exercise of his fiduciary and statutory duty as a director. His purported intention to sell is wholly inconsequential to the denial of his inspection I rights, for his duties as a director are separate and independent from his ownership of shares in those companies.

[84] There is no suggestion, and certainly no evidence that the information sought by the plaintiff from the defendant company somehow would have a bearing on the valuation of the shares allegedly intended to be sold by him. Neither had the defendant furnished any evidence to substantiate its allegation that Pecol Industries (given that this company was copied with the letters sent by the plaintiff to the banks in respect of the impugned acts) instructed the plaintiff to commence the present action.

[85] The argument that this action is premature, as the resolution of the defendant's Board suspending the plaintiff's directorship remain standing such that the plaintiff ought to have first applied for the resolution of his suspension to be nullified is plainly misconceived. As stated earlier, the inspection rights of a director are virtually absolute, and can only be defeated by clear proof of the exercise thereof being for ulterior purposes unrelated to the proper discharge of director's duties. The exercise of such right cannot be made dependent on conditions such as now suggested by the defendant, namely for the plaintiff to first seek the invalidation of the suspension.

[86] It is worthy of emphasis that mere allegation which is not substantiated with evidential support is patently insufficient to deny the statutorily entrenched inspection rights of company directors. The law requires no less than clear proof. Again, I reiterate that the Court of Appeal in *Dato' Tan Kim Hor & Ors v. Tan Chong Consolidated Sdn Bhd* [2008] 1 LNS 741; [2009] 2 MLJ 527 stated thus:

> It is for the defendant to show clear proof and to satisfy the court affirmatively that the grant of the right of inspection would be for a purpose detrimental to the interests of the company. There must be a real grounds that the right would be abused and that substantial harm would be caused to the company thereby ...

[87] It is not easy to demonstrate clear proof. As such, even the fact that a director has set up a competing company does not *ipso facto* indicates that he would be using the accounts and records of the company for the ulterior purpose of benefiting the former (see the High Court decision in *Mageswary Kannaiah v. Vithylingam Mayandy & Anor* [2009] 9 CLJ 40). It needs no reminding that in the instant case, there are no similar allegations. The basis was merely the one-off impugned acts. The plaintiff might have exercised wrong judgment when effecting the impugned act, but without more, I do not for one moment doubt that clear proof has not been established that the inspection would be for any ulterior or improper motive incompatible with the proper discharge of a director's duties.

[88] I therefore find the defendant's arguments to resist this instant application to lacking in substance, and in any event far from furnishing clear proof (which burden is manifestly on the defendant to discharge) of any ulterior or purposes unrelated to the exercise of director's duties that could justify the striking out of the application for access to documents in encl. 3 or the denial of inspection rights under s. 167(3) in encl. 1.

[89] It must be said that it is not difficult to discern that the plaintiff's suspicions on the financial records may even compel him under the law, in the discharge of his fiduciary and statutory duties, to undertake the requisite inspection (see *Ho Yee Chin v. Ho Min Hao & Ors*, referred to earlier). His failure to do so may open him to charges of breaches of director's duties, apart from the failure of the company and the directors to keep proper records under s. 167(1), as may be punished under s. 167(7) of the CA as stated earlier. I again emphasise that as a corollary, a failure on the part of company or any of its directors in permitting the exercise of inspection rights under s. 167(3) is also an offence under s. 167(7) of the CA.

[90] In *Law Wai Duen v. Boldwin Construction Co Ltd* [2001] HKCA 284 the Court of Appeal of Hong Kong stated:

> Hence, in relation to many matters directors will no doubt rely upon what is done by company officials and their fellow directors in relation to the affairs of a company. But that is not the say that the ultimate responsibility does not lie upon the director. If a director has cause to be suspicious, or reasonably believes there is such cause, *then the director may incur liability if he does not satisfy himself in relation to all matters relating to the company's affairs. More importantly, even if a director does rely upon other directors or company officials in the conduct of the company's affairs, he must, at all times, be at liberty to satisfy himself as to any matter in relation to the company's business.*
>
> (emphasis added)

[91] In encl. 1, the plaintiff seeks to inspect various accounting records on financial transactions of the defendant company. He appears to suspect something is amiss with the financial records. As a director, I reiterate that the plaintiff does not even have to justify why he needs to examine the records. He is a director. He should have access. In this case, the plaintiff has in fact spelt out the basis of his concerns. These included, as stated earlier, the proposal on the utilisation of the Public Bank facility, the specific issues concerning the financials of the company as well as the fact that he was also a guarantor for the Public Bank facility.

[92] I accept that this is a personal guarantee; but it cannot be denied that the reason for the guarantee executed by the plaintiff for the loan to the defendant company was precisely the status of the plaintiff being a director of the borrowing company. Yet the same guarantor director is denied access to company information including even in respect of the Public Bank facility itself, for reasons purportedly attributed to the impugned acts which are however unrelated to the basis for the inspection application.

[93] The defendant's argument that the fact that the plaintiff is a personal guarantor meant that the reason for inspection is unrelated to the performance of his director's duties is therefore untenable.

[94] It is in my view not out of place for me to reproduce passages from my judgment in the case of *Dato' Seri Timor Shah Rafiq v. Nautilus Tug & Towage Sdn Bhd* [2017] 1 LNS 579; [2017] MLJU 540 which deal with the same issue of director's inspection right as presently:

> Additional Observations on Principles Governing Director's Inspection Rights
>
> [86] It is plain from the words in Section 167(1) of the CA (Section 245 (1) of the Companies Act 2016) that the duty to keep accounting records is imposed on not just the company but every director and manager of the company. Given the common law and statutory inspection right in Section 167(3), a denial of such right may even permit action be taken by the requesting director against his fellow directors in addition to the company, more so as Section 167(7) too refers to the liability of every officer (in addition to the company) for any infringement of Section 167 of the CA.
>
> [87] As the law firmly recognises that the directors stand in a fiduciary relationship to the company they serve, this virtually unqualified right of inspection under the statute and common law is manifestly in aid of such principle. For it is a pre-requisite to the proper discharge of the statutory and fiduciary duties of good faith, care, skill and diligence.
>
> [88] By virtue of holding the office of a director of a company, once the director makes a request under Section 167 (Section 245 under the Companies Act 2016) or the common law, which the director does not need to provide justification for, as the law presumes it to be made in the best interest of the company, but which request is however declined by the company, a *prima facie* demonstration of the director's entitlement to the documents has been established. For in all cases of refusal, all that a director needs to demonstrate in order to enforce his inspection right is that he or she is a director of the company, that as a director, he or she has demanded inspection, and that the right has been refused.
>
> [89] The burden then shifts to the company to rebut the presumption of the request being in the best interest of the company or made in the discharge of director's duties, by showing clear evidence of impropriety in the director's purpose or which is unrelated to the discharge of director's duties that could justify denial of inspection of the documents, and with it requests for copies of such documents, as well as the right to appoint an agent or auditor on behalf of the director to perform the inspection.
>
> [90] There is no residual discretion on the part of the Courts in evaluating an application for inspection. It is either the inspection is in the proper discharge of director's duties or it is not. If it is the former, which is presumed in all cases, the exercise of the right of inspection must be allowed. If the latter, which must be borne out of clear proof of impropriety in relation to the request (thus rebutting the presumption), inspection must be denied, because

otherwise the Court would be facilitating an abuse and breach of director's statutory and fiduciary duties, which the Courts must never countenance.

[91] A company which nevertheless insists on refusing the exercise of such inspection despite not being able to provide clear proof the justify refusal commits an offence and if convicted runs the risk of being liable to the punishment for the contravention as stipulated in Section 167(7) of the CA.

[92] It would be a justified extension of the principle allowing rights of inspection rights that such a right of inspection may be characterised as not merely a right, but even a duty. In certain circumstances, especially when there are reasons to suspect that all is not well with the financials of the company, directors, being responsible for the management and well-being of the company, are duty bound to make the necessary inquiries and to address any deficiencies, in the best interest of the company.

[93] The fact that a director may be hostile towards the company or its staff does not limit the inspection right and the right to take copies. The mere possibility of abuse or misuse of the right does not afford any ground for its denial or restriction. A director retains this right of inspection (inclusive of the right to be supplied with copies of documents so inspected), despite mere allegations that he is hostile, adverse or a competitor of the corporation, for as long as he remains a director of the company.

[94] Without clear evidence to such effect, attempts to restrict such rights will not withstand judicial scrutiny. Otherwise, refusal of inspection and taking of copies could lead to a corresponding dilution of accountability on the part of the directors, resulting in an unwarranted and dangerous inroad into the sacrosanct principle of directors' duty of management in company law.

Conclusion

[95] In view of the foregoing reasons, it is my judgment that the defendant has not succeeded in establishing a case for the striking out of the originating summons filed by the plaintiff. The plaintiff has however successfully proven his case on a balance of probabilities to justify the inspection rights in encl. 1. I therefore dismiss encl. 3, and allow encl. 1 with costs.